U.S. Department of Labor

Office of Administrative Law Judges
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Case No.: 1999-LHC-3022

OWCP No.: 02-116813

In the Matter of:

SHANE L. HARRIS

Claimant

V.

TOTAL ENGINEERING SERVICES TEAM, INC.

Employer

CIGNA INSURANCE CO.

Carrier

APPEARANCES:

David A. Abramson, Esq.

For the Claimant

Craig W. Brewer, Esq.

For Employer/Carrier

Before: LEE J. ROMERO, JR.
Administrative Law Judge

Decision and Order

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (herein the Act), 33 U.S.C. § 901, et seq., brought by Shane Harris (Claimant) against Total Engineering Services Team, Inc. (Employer) and Cigna Insurance Co. (Carrier).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges on September 16, 1999, for hearing. Pursuant thereto, Notice of Hearing issued scheduling a formal hearing on May 23, 2000, in Metairie, Louisiana. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. Claimant offered six exhibits while Employer/Carrier proffered twelve exhibits which were admitted into evidence along with one Joint Exhibit. This decision is based upon a full consideration of the entire record.[1]

Post-hearing briefs were received from Claimant and Employer/Carrier on October 10, 2000. Based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

I. STIPULATIONS

At the commencement of the hearing, the parties stipulated (JX-1), and I find:

1. That the date of Claimant's injury/accident was August 22, 1994.

2. That the injury was in the course and scope of employment.

3. That an Employer/Employee relationship existed at the time of the accident.

4. That Employer was advised of the injury on August 22, 1994.

5. That Claimant's average weekly wage at the time of injury was $372.94.

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[1] References to the transcript and exhibits are as follows: Transcript: Tr.___ ; Claimant's Exhibits: CX-___; Employer/Carrier's Exhibits: EX-___; and Joint Exhibit: JX-__ .

6. That Claimant was paid temporary total disability benefits from August 22, 1994 to May 23, 2000 at the rate of $248.63 per week.

7. That Employer has paid medical benefits.

II. ISSUES

The unresolved issues presented by the parties are:

1. Nature and extent of Claimant's disability.

2. Date of maximum medical improvement.

3. Claimant's entitlement to retroactive cost of living adjustments under Section 10(f) of the Act.

4. Employer's entitlement to Section 8(f) relief.

5. Attorney's fees.

III. STATEMENT OF THE CASE

The Testimonial Evidence

Claimant

Claimant testified he was thirty years old and married without any children. (Tr. 99). He reported taking Prozac[2],

[2] Prozac is used in the treatment of depression. Dorland's Illustrated Medical Dictionary 643 (28th ed. 1994).

Imitrex[3], Atenolol[4], Eskalith[5] and Doxepin[6] before the hearing. (Tr. 98). He graduated from high school and attended vocational tech school for one year as he studied to be an electrician. (Tr. 99-100).

Claimant stated on August 22, 1994, he was working as an electrician's apprentice for Employer and IMTT in Bayonne, New Jersey. (Tr. 100). As an electrician's apprentice, Claimant wired panels, terminated panels, pulled wires in conduit and worked with instruments. (Tr. 101).

Claimant reported on August 22, 1994, he was working in a substation building and a wire had to be moved from one side of the room to the other. The wire had a diameter of at least a halfdollar and was very difficult to bend. Claimant testified his supervisors told him to force the wire through an opening, so he tried to bend the wire as best he could to push the wire through the opening. (Tr. 102). When he did, Claimant stated the wire "caught on something and sprung and whacked me above my left eye, across the bridge of my nose and under my right eye." (Tr. 103).

Claimant testified he was not knocked out, but the blow broke his safety glasses in half across his face. He noted he felt dizzy. He stated he went to the living quarters after the incident and laid down. When he laid down, he began vomiting. He informed his supervisors that he needed to go to the hospital and was transported to the emergency room at Bayonne Hospital. (Tr. 103).

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[3] Imitrex is used in the acute treatment of migraine headaches. Id. at 1608.

[4] Atenolol is used in the treatment of hypertension and chronic angina pectoris (chest pain). Id. at 154.

[5] Eskalith is used in the treatment of acute manic states and in the prophylaxis of recurrent affective disorders manifested by depression or mania only, or those in which both mania and depression occur occasionally. Id. at 952.

[6] Doxepin is an antidepressant also used to treat chronic pain, peptic ulcer, pruritus and idiopathic cold urticaria. Id. at 505.

At the hospital, Claimant was given ice and kept overnight for observation. (Tr. 104). He stayed there for six days and then returned to Morgan City, Louisiana. (Tr. 105). Since his return to Louisiana, Claimant has been treated by Dr. Blotner, whom Claimant sees about every three weeks. (Tr. 106).

Claimant stated, since his injury, he has had headaches, vision problems, dizziness and concentration problems. (Tr. 106). He testified since he began treatment for his injury, he has stuttered less and his equilibrium and sight have improved. He reported having blurred vision, headaches, ringing in his ears, distorted equilibrium, "short-term memory" and mood swings. (Tr. 107). He noted if he has to read, he must hold the item about two or three inches from his eyes. He confirmed he gets "frustrated and upset because of the problems [he has] had following [the August 22, 1994] accident." (Tr. 108).

Claimant confirmed he did not have these above-described problems before his August 22, 1994 accident and he was able to perform his job as an electrician without any difficulties. (Tr. 108). He testified he could not perform the electrician job today. Claimant further testified his driver's license was taken away after the accident because he could not pass the "eye chart" test. (Tr. 109).

Claimant stated his typical day involves waking up, playing with his dogs and cleaning-up his shed. When he gets a headache, he lays down and takes medicine. (Tr. 109). He observed he has a constant, numbing headache. (Tr. 111).

On cross-examination, Claimant confirmed he suffered several head injuries prior to his August 1994 accident. He agreed he was knocked-out twice playing football as a teenager. (Tr. 114). He further confirmed he fell from a trampoline in February 1987 and hit his head on concrete. This accident caused Claimant throbbing headaches and visual problems which lasted "a couple of weeks." (Tr. 118). He again confirmed being in a fist fight in March 1987 and getting hit in the left temple which caused his vision to become blurred. (Tr. 119-20). He testified he did not remember falling off a "human pyramid" in February 1988. (Tr. 120). He reported he was mugged in 1988 but does not remember hitting his head against a park bench. (Tr. 121-22). He confirmed he sustained a hyper-extended neck injury while playing football in high school. (Tr. 123).

Claimant confirmed he broke his ankle while working for

McDermott, was hit by a swinging pipe on a crane while working for McDermott, damaged ligaments in his finger while working for Dolphin Services and injured his knee while working for SECO. (Tr. 124-25).

Claimant testified he recovered from his head injuries prior to the August 1994 accident, and was able to go back to work. (Tr. 137-38).

Claimant testified he had a pre-employment physical before working for Employer. During that physical, he related to the doctor he had sustained some concussions in high school and had sustained an accidental gunshot wound in his stomach in 1988. (Tr. 126-27, 129-30). He confirmed he "might have said" to Dr. Salcedo he attempted suicide and used marijuana, cocaine and prescription drugs during high school. (Tr. 130).

Claimant reported he had seen the surveillance videos proffered by Employer/Carrier in this matter and confirmed he was the subject of the videos. He testified his wife called the police because a man in a car was watching them and the officer informed him that he was being filmed. (Tr. 132).

Claimant confirmed he can do some cooking, do some laundry, take the garbage out, grocery shop with his wife, play with his dogs, help friends work on their cars, pump gas, perform minor plumbing work and begin the building of a fence in his yard. (Tr. 133-35). He reported he sometimes rents a room out of his house for $150 per month and he previously allowed a "repo man [to] park cars in [his] yard." He confirmed he "sometimes . . . had to" move the cars around. (Tr. 136).

Claimant testified hyperbaric treatment has helped him. (Tr. 106, 137).

Diane M. Harris

Mrs. Diane Harris, Claimant's wife, testified she is thirty-three years old and has been married to Claimant for ten years. (Tr. 144). She reported since Claimant's August 1994 accident, he has mood swings, he is anxious whereas before the accident he was very easy-going, he sleeps more, he complains of headaches constantly, he complains of vision problems and his memory problems are obvious. (Tr. 145-46).

Mrs. Harris stated Claimant's father drives Claimant to his doctor's appointments as Claimant has not driven himself anywhere since the accident. (Tr. 147). She reported she periodically gives Claimant chores to do around the house depending on their difficulty. She noted Claimant cannot be active more than approximately two hours before he needs to either rest or take a nap. (Tr. 148). She emphasized Claimant naps from two to four hours daily. (Tr. 151).

Mrs. Harris reported she is not currently employed and is on social security disability. (Tr. 152). She confirmed she had seen the surveillance videos proffered by Employer/Carrier in this matter and further confirmed she and Claimant were taped therein. (Tr. 153).

The Video Surveillance

Employer/Carrier submitted seven tapes of video surveillance of Claimant from December 8, 1994 to February 2, 2000. The videos show Claimant in several activities ranging from loading a truck, walking his dogs, bringing groceries and presents into a house and taking measurements for a fence in his yard. During most of the surveillance, Claimant is moving slowly and wearing sunglasses. Furthermore, on only one occasion during the surveillance does Claimant drive a vehicle. On January 14, 2000, Claimant moved a truck from one end of his driveway to the other. (EX-H, Tape #6). All other scenes in the video surveillance tapes do not contradict
testimony given by Claimant. (EX-H, Tapes #1-7).

The Medical Evidence

West Jefferson Medical Center

A December 2, 1983 Emergency Department report indicated Claimant presented with a head injury from playing football. He had an abrasion on the right side of his forehead, was pale, but answered questions appropriately. He did not remember the accident. (CX-1, p. 16). A Discharge Summary, dated December 4, 1983, reported Claimant lost consciousness from the December 2, 1983 accident. Headaches and vomiting followed the accident.

A neurological examination was normal. (CX-1, p. 21). A CT head scan indicated Claimant suffered a brain concussion. (CX-1, p. 28).

A February 11, 1988 Emergency Department report indicated Claimant presented with an injury to the head and right hand. The report indicated Claimant had multiple facial abrasions. (CX-1, p. 6). Claimant presented a history of being "jumped" in a playground by two people and having his head slammed into a picnic table. He was knocked-out and sustained slurred speech. He also noted he fell two days before this incident and suffered a concussion although he did not see a doctor. (CX-1, p. 8). A radiology report dated February 13, 1988, indicated there were no facial bone fractures and Claimant's orbital rims and floors, zycomatic arches and maxillary sinus walls appeared intact. (CX-l, p. 9).

A May 19, 1995 Single Photo Emission Computed Tomography (SPECT) brain imaging report indicated Claimant presented with clinical head trauma. The impression reported mild cortical patchiness with decreased activity in both frontal lobes, mild decrease in tracer activity in the left parietal and left basal ganglia regions and normal and symmetric tracer activity noted in the occipital lobes and cerebellar hemispheres. (CX-1, p. 10).

A September 2, 1995 SPECT brain imaging report indicated Claimant presented with clinical trauma. The impression noted a global increase in cortical tracer activity with questionable tiny residual defect in the left parietal apex and decreased activity in the left basal gangliar region. The report stated there was more tracer activity than on the previous SPECT scan. (CX-l, p. 11).

T. Erik Borresen, M.D.

Dr. Erik Borresen, board-certified in neurology, electrodiagnostic medicine and clinical neurophysiology, testified by telephonic deposition on July 18, 2000. Dr. Borresen reported he has practiced neurology since 1980 and practiced neurology in New Orleans, Louisiana, from 1983 through 1996. (EX-J, p. 5).

Dr. Borresen testified the first level of data in determining if a patient has sustained a permanent brain injury

is the history and physical examination or the neurologic examination. The second level consists of CT scans or MRI scans of the brain. Subsequently, there may be EEG tests, neuropsychological testing or evoked response tests.[7] (EX-J, pp. 11-12). Dr. Borresen noted he is familiar with SPECT scans but does not employ them in his practice as they have not "been very helpful" to him. (EX-J, p. 12).

Dr. Borresen stated SPECT scans are "non-specific tests. Just like neuropsychological testing, they show areas in the brain that may not function perfectly normal, but do not tell us very much about what's the etiology or the cause of that." (EX-J, p. 13).

Dr. Borresen acknowledged he is familiar with the use of hyperbaric treatments for individuals who have sustained traumatic brain injuries. He reported he does not employ, nor has he recommended, hyperbaric treatments for treating patients who may have sustained closed head injuries or mild traumatic head injuries. He does not feel hyperbaric treatments are a standard or proven treatment. (EX-J, p. 15).

Dr. Borresen testified he first examined Claimant in February 1987 on a referral from Dr. Douglas Bostick. Claimant was sixteen years old and complained of blurred vision and headaches. (EX-J, p. 16). These complaints were attributable to an incident in which Claimant fell-off a trampoline and struck his head on concrete. (EX-J, pp. 16-17). Claimant denied a loss of consciousness. (EX-J, p. 17).

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[7] Dr. Borresen explained an evoked response test is an electrical test of primarily optic nerve function. It is typically administered by having the patient watch a television screen with a flickering checkerboard pattern which generates signals in the retina that are sent through the optic nerves to the occipital lobes, the part of the brain that interprets vision. Electrodes are placed over that part of the brain and electrical signals in the brain are measured. There are normal standards for these potentials. The patient's visual response is compared to the normal standards to determine if the patient is "normal" or not. (EX-J, p. 30).

Dr. Borresen ordered a CT scan of Claimant's brain. The CT scan was normal and revealed no blood or any other abnormality of the brain. (EX-J, p. 18).

Dr. Borresen examined Claimant again on March 5, 1987, after Claimant had been involved in a fist fight and had sustained a blow to his left temple. Claimant denied a loss of consciousness. He complained of blurred vision and a blackout of vision which lasted for twenty minutes. He further complained of headaches which were continuous behind his eyes. Dr. Borresen diagnosed a concussion and restricted Claimant from contact activities and from driving. (EX-J, p. 19).

Dr. Borresen noted Claimant returned on March 12, 1987, for a follow-up examination and reported "he was doing better. He reported infrequent headaches and also that his vision was better. He had no difficulty seeing and wanted to go back to play baseball and football at that time." (EX-J, p. 20). Dr. Borresen examined Claimant on March 30, 1987, and observed Claimant's eyes were "back to normal and that he had only what he called regular headaches." (EX-J, p. 21).

On February 12, 1988, Dr. Borresen examined Claimant who reported having had two head injuries. (EX-J, p. 21). The first injury occurred three days before the February 12, 1988 examination when Claimant fell from the top of a human pyramid and landed on his face without a loss of consciousness. The second injury occurred the day before the examination when Claimant was "mugged and his head had been knocked against a park bench and he had been semi-conscious." Claimant complained of headaches, blurred vision and dizziness. Dr. Borresen diagnosed another concussion. (EX-J, p. 22).

Dr. Borresen testified he "understood that [Claimant] had resumed normal activity and had been working as an electrician's helper, which I would assume for him was normal activity" after his four prior concussions and prior to the August 22, 1994 accident. (EX-J, p. 50).

Dr. Borresen examined Claimant next on August 29, 1994 after Claimant had been struck in the face by a cable while working in Bayonne, New Jersey. (EX-J, pp. 22-23). Claimant complained of blurred vision, ringing in the ears and headaches. (EX-J, p. 23). Dr. Borresen conducted a neurological examination which was normal. (EX-J, p. 25). He diagnosed a mild concussion.

(EX-J, p. 24). He confirmed he did not have any concern that Claimant had permanent brain damage or injury. (EX-J, p. 26). He reported he "didn't think that there was any hemorrhage or bruises in [Claimant's] brain that could explain this reduced vision that he complained of." (EX-J, p. 27). He further reported he never found any organic cause for Claimant's visual loss. (EX-J, p. 35).

Dr. Borresen ordered an electro-nystagmugram (ENG) for Claimant. He explained an ENG is a test of the vestibular apparatus which is the balance organ located in what is referred to as the inner ear. In an October 3, 1994 report, he confirmed that Dr. Kimble found Claimant had a right peripheral vestibular abnormality, which is an abnormality in the balance organ in the inner ear on the right side. (EX-J, pp. 58-59). Dr. Borresen confirmed this diagnosis would be consistent with Claimant's complaints of dizziness and would be an organic basis for those complaints. (EX-J, p. 59).

Dr. Borresen acknowledged that on April 3, 1995, he turned over medicinal management of Claimant to Dr. Blotner but continued to see Claimant in follow-up. Dr. Borresen noted Dr. Blotner, a psychiatrist, adjusted Claimant's medications which were predominantly used for psychiatric symptoms, such as irritability and mood swings. (EX-J, p. 41).

Dr. Borresen opined "there is nothing suggesting underlying organic disease and the impression was there was definite psychological components to [Claimant's] symptoms." (EX-J, p. 44). He further confirmed Claimant had reached maximum medical improvement by the time he examined Claimant on September 5, 1996 and "should be able to return to some type of work capacity." Dr. Borresen reported he could find no neurological impairment. (EX-J, pp. 47-48). He testified he would defer to Dr. Salcedo, a psychologist, to determine whether Claimant was malingering. (EX-J, pp. 49, 57).

Bayonne Hospital Records

An August 22, 1994 inpatient registration report indicated Claimant presented with a cerebral concussion after being hit in the head with a heavy cable which snapped at work. (CX-2, pp. 2, 4). He reported nausea and severe headaches. The Emergency Department report diagnosed a head trauma and cerebral concussion. (CX-2, p. 4).

An August 27, 1994 Discharge Summary indicated CAT scans were normal and x-rays of sinuses were unremarkable. The final diagnosis was "concussion with postconcussive syndrome with ocular contusion." (CX-2, p. 7).

Owen B. Leftwich, M.D.

Dr. Owen Leftwich, board-certified in ophthalmology and instructor at LSU Eye Center, testified by deposition on April 25, 2000, and was accepted by the parties as an expert in the field of ophthalmology. (EX-I, p. 5). He initially examined Claimant at the request of Dr. Borresen on August 31, 1994, when Claimant presented with complaints of headaches behind his eyes. (EX-I, p. 9).

Dr. Leftwich examined Claimant on September 9, 1994, and found no structural abnormalities. (EX-I, p. 16). He opined Claimant had an optic nerve injury. (EX-I, p. 15). Visual testing of Claimant revealed "he had marked constriction of his visual field on both sides." (EX-I, p. 20). Dr. Leftwich opined Claimant's visual problems were neurologic, either from the optic nerve or the cortex. (EX-I, p. 22).

Dr. Leftwich examined Claimant again on September 27, 1994. Claimant complained of "bad headaches" and blurred vision. Dr. Leftwich opined Claimant either had optic nerve injury or nonfunctional loss.[8] (EX-I, p. 22). He examined Claimant again on December 27, 1994 with Claimant complaining of poor vision. (EX-I, pp. 25-26). After examining Claimant on April 11, 1995 and July 22, 1996, Dr. Leftwich opined "from an ophthalmologic standpoint, there was no physiological reason for [Claimant's] loss of vision." (EX-I, p. 34).

Rafael F. Salcedo, Ph.D.

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[8] Dr. Leftwich explained nonfunctional loss indicates there is no functional reason for the vision loss. The loss is due to either secondary gain or hysterical loss. (EX-I, pp. 22-23).

Dr. Rafael Salcedo, a licensed clinical psychologist,[9] testified by deposition on May 2, 2000. (CX-5, p. 4). Dr. Salcedo initially examined Claimant on November 14, 1994, upon a referral from Dr. Borresen for a neuropsychological evaluation. (CX-5, p. 7; CX-5, Exhibit #2, p. 1).

Dr. Salcedo observed Dr. Borresen diagnosed Claimant with "posttraumatic headaches, complaints of visual difficulties, mood difficulties and tenitis[10] (sic)." (CX-5, p. 15). Dr. Salcedo administered neuropsychological batteries to Claimant on November 19, 1994 and May 10, 1996. (CX-5, Exhibit #2, pp. 1, 7). He explained a neuropsychological battery involves clinically examining the patient, obtaining a history, observing the mood, affective range, speech, language, any motor or gait abnormalities or any psychotic symptoms and administering a battery of twelve to fifteen tests. (CX-5, pp. 16-17). He observed Claimant had problems with a block-design test due to his vision. (CX-5, p. 78). To complete other tests, Claimant had to hold the paper or object up to his nose in order to see them. (CX-5, p. 79).

Dr. Salcedo testified Claimant was alert and oriented as to place, person and time. He complained of visual difficulties and was not suicidal. (CX-5, p. 18). He noted Claimant was anxious, depressed and appeared to be manifesting "central blindness," which is presumed damage to the cortical area of the brain as a result of the August 22, 1994 accident without any peripheral nerve injury. (CX-5, pp. 19-20).

Dr. Salcedo reported that 85 to 90 percent of people suffering a mild head injury recover within a few days, but for those individuals who do not recover, the problems can persist

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[9] Dr. Salcedo explained clinical psychology is "the study of human behavior with primarily an emphasis on abnormal behavior, the causes of abnormal behavior and the treatment of abnormal behavior." (CX-5, p. 9). Dr. Salcedo earned his Ph.D. in clinical psychology in 1983 and has been in private practice in the New Orleans area since 1985. (CX-5, Exhibit #1, p. 1).

[10] Tinnitus refers to "a noise in the ears, such as ringing, buzzing, roaring or clicking. Dorland's Illustrated Medical Dictionary 1714 (28th ed. 1994).

for "quite some time and can be very debilitating." (CX-5, p. 23).

Dr. Salcedo stated Claimant reported a history of a suicide attempt. (CX-5, p. 27). He opined Claimant "strikes me as an individual who displays the psychological characteristics of someone who has sustained a mild head injury. Those being not so much the visual stuff, but the depression, the emotional liability, this panic state that he can work himself into. And all of those things are fairly common and typical among head injury. The visual complaints are atypical. I don't know quite what to make of that. I don't believe that they're strictly psychogenic. I think there may be . . . some psychological contribution in that regard. But I would defer to a neuro-ophthalmologist on the issue pertaining to his visual problems." (CX-5, p. 32).

Dr. Salcedo administered the Wechsler Adult Intelligence Scale to Claimant who obtained a verbal acuity of 94, which is average. Claimant had difficulty completing some of the subtests which contributed to the performance IQ of 76, which is considered borderline between low and average mild mental retardation. Dr. Salcedo did not consider this score valid because of Claimant's visual difficulties. (CX-5, p. 35). The results of the Wechsler Memory Scale Revised Test indicated Claimant had no major attention and concentration problems. (CX-5, p. 45). Claimant's score on the 1994 application of the test was 88, which suggested Claimant had "no major problems," and his score on the 1996 test increased to 102. (CX-5, p. 47).

Dr. Salcedo reported he did not feel Claimant was malingering. (CX-5, pp. 37, 84). He observed Claimant had been consistent for six years in his complaints and "it's difficult to maintain this type of facade or charade for six years running without someone not noticing the inconsistencies." (CX-5, pp. 39-40, 84).

Dr. Salcedo testified Claimant's reading and spelling skills, measures of both visual and auditory learning and memory improved from 1994 to 1996. However, Claimant's gross sensory perceptual tasks, speech and language functioning, motor tests and measures of complex perceptual processing did not improve during this time. There were no decreases in functionality during this time period. (CX-5, p. 50).

Dr. Salcedo stated when he evaluated Claimant in May 1996,

Claimant was excited about the hyperbaric treatments and "he seemed to be doing better." (CX-5, pp. 51-52). Dr. Salcedo attributed Claimant's improvement to either Claimant "assuming a patient role" via "unconscious or psychological reasons," or the hyperbaric treatment was working. (CX-5, p. 55).

Dr. Salcedo observed Claimant "still has a lot of emotion problems now" and complains of visual difficulties. (CX-5, pp. 56, 81). He recommends Claimant be sent to a vocational-type program designed for individuals with visual handicaps and Claimant continue evaluations with Dr. Blotner for his psychological issues. He further recommended that work accommodations be made so that Claimant can work without undue stress. (CX-5, pp. 57, 69, 71, 90-91). Dr. Salcedo did not expect any of Claimant's test results to improve. (CX-5, p. 58). He opined Claimant's symptoms are related to the August 22, 1994 accident. (CX-5, p. 82).

Dr. Salcedo evaluated Claimant on March 23, 2000, on a referral from Carla Seyler. He administered the MMPI as a gauge of the level of emotional dysfunction. (CX-5, p. 59). He determined Claimant is "essentially unchanged" in his emotional and neuropsychological states. (CX-5, p. 61).

Dr. Salcedo testified Claimant "probably . . . had a predisposition to develop problems [after the August 22, 1994 accident] . . . He has had a rather catastrophic emotional reaction to this accident. Somebody else might have not dealt with it in the way that he did. Probably most people would not have dealt with it emotionally as intensely or as dramatically as he has. But he has." (CX-5, p. 63). Dr. Salcedo opined Claimant's psychological issues continue to be handicapping. (CX-5, pp. 67, 72). Furthermore, he opined Claimant's visual acuity problems prevent him from returning to gainful employment without some type of vocational training. (CX-5, p. 69).

Dr. Salcedo stated he has no knowledge of Claimant having had any problems in performing his assigned job functions prior to the August 22, 1994 accident. (CX-5, p. 73).

Jonathan C. Calkwood, M.D.

In a letter dated January 17, 1995, to Dr. Owen Leftwich, Dr. Jonathan Calkwood noted Claimant had been sent to the LSU Eye Center Neuro-ophthalmology Clinic for an evaluation for

headaches. (EX-L, p. 1). Dr. Calkwood reported:

> After a thorough evaluation of [Claimant's] history and physical examination, I feel that his headache and decreased visual acuity can be explained by a post concussion syndrome with a hysterical component. This was manifested during our examination today by several pieces of contradictory data . . . In addition, many of the patient's responses to historical questions were of a contradictory and hesitant quality. I spoke to [Claimant] at length about post concussion syndrome and its manifestations, and I explained to him that his potential for complete visual recovery was 100%. I agree with conservative treatment with regard to continuing medical management for headaches, although I did note and explain to him that the usage of both Elavil, as well as Amitriptyline and Xanax might be contributing to the disoriented and fatigued state that he currently reported. I also suggested to him that he discontinue the use of magnifying spectacles for near vision, as well as sun shades. I feel that the use of confrontation and psychiatric intervention are generally unhelpful in patients such as this and I would discourage these techniques. (EX-L, p. 2).

Adrian Blotner, M.D.

Dr. Adrian Blotner, board-certified in psychiatry and pain management, was accepted as an expert in psychiatry and pain management. (Tr. 30-32). Dr. Blotner initially examined Claimant on March 27, 1995, on a referral from Drs. Morrison and Salcedo. (Tr. 32). Dr. Blotner testified he has become Claimant's treating physician. (Tr. 35). He received a history from Claimant which revealed Claimant "was in good health, without significant physical or psychiatric impairment until August 22, 1994, when he experienced a head injury. He described having been hit between the eyes on his forehead by a rigid cable, which . . . "lifted me off my feet and split my skin off my forehead open, leaving a big whelp." (Tr. 32-33).

Dr. Blotner testified that following the accident, Claimant complained of "persistent nausea and vomiting followed by persistent headaches, pain between the eyes and in the back of

the head, ringing in the ears, blurred vision, severe visual impairment, including not being able to read anything beyond six inches away." Claimant further reported to Dr. Blotner "he had unsteadiness on his feet with his eyes closed and is dizzy when in a car. He said that for 48 to 72 hours, he often went without sleep but then sleeps so soundly that he cannot be woken up by his wife." (Tr. 33).

Dr. Blotner reported Claimant's "usual sleep was four to five hours per night at that time. He said he did not lose consciousness with the injury, that he had some level of depressed mood but no suicidal ideation. He said he was extremely frustrated and extremely anxious about his limitations and . . . his ability to do things he used to enjoy doing, including driving, working as an electrician's apprentice, and enjoying his time with his wife, his family, and his friends. He stated that he recently filed bankruptcy, due to the financial devastation due to his inability to work. Other symptoms included dry mouth, upset stomach, temper outbursts, and sugar craving. Also, his concentration was impaired." (Tr. 33-34).

Dr. Blotner stated Claimant presented a past medical history which revealed "head trauma several years ago, with loss of consciousness and temporary visual problems. He said these were relatively minor and resolved completely, leaving him with no significant impairment a few months after the two incidents." Claimant reported "he had stomach surgery due to an accidental self-inflicted gunshot wound several years before the initial interview, which again resolved without any significant impairment in his ability to perform his usual social and work activities." (Tr. 34).

Dr. Blotner observed Claimant was "taking Prozac, 20 milligrams daily, Antivert three times daily for the last three months. He said he had taken Xanax, one milligram three times daily; Toradal[11] . . . four times daily; and Elavil, 50 milligrams at bedtime for approximately the last six to seven months." (Tr. 34-35).

On physical examination, Dr. Blotner testified Claimant was

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[11] Toradal is a nonsteroidal anti-inflammatory agent used for short-term management of pain. Dorland's Illustrated Medical Dictionary 881 (28th ed. 1994).

alert and his mood was moderately depressed. Claimant's affect, which refers to his external facial expressions, was severely agitated and anxious. On psychomotor examination, or overall body
movements, Claimant was very agitated and "fidgety with his arms and legs, slightly tremulous at times with constant movement of his hands and legs." Dr. Blotner observed Claimant was able to read at approximately six inches away from his face, but was only able to describe vague shapes at distances of three feet or greater away from him. Dr. Blotner reported Claimant's "thought processes were fairly well organized, and he denied suicidal or homicidal thoughts . . . ." Claimant "denied psychotic symptoms, including delusions and hallucinations." (Tr. 36).

Dr. Blotner opined Claimant had "dementia due to head trauma, as defined in the Diagnostic and Statistical Manual of Mental Disorder, Fourth Edition" (DSM-IV). Dr. Blotner observed he "should have added mood and anxiety disorders due to the physical pain and the . . . headaches and the loss of functioning, social and occupational functioning . . . ." Dr. Blotner commented Claimant "has a diagnosis of relational problem[12] related to general medical condition, partner relational problem, secondary to his head trauma, and occupational problem." (Tr. 37). Dr. Blotner opined Claimant was unable to return to his regular employment at the time of the initial visit. (Tr. 40).

Dr. Blotner reported on Axis III, which indicates medical conditions, a diagnosis of head injury. On Axis IV, which refers to external situational stressors, he noted loss of job, loss of finances, impaired ability to perform social activities with his wife, family and friends, loss of ability to perform leisure activities and loss of vision. On Axis V, which refers to the Global Assessment of Functioning Scale as defined in the DSM-IV, Dr. Blotner rated Claimant as 50, which corresponds to severe social and occupational impairment and severe level of symptoms. (Tr. 38).

Dr. Blotner testified that in the past year he rated Claimant as 80 on Axis V. An 80 indicates "essentially no impairment. No persistent or ongoing symptoms that are impairing social or occupational functioning." Dr. Blotner stated he recommended Claimant continue taking the medications

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[12] Dr. Blotner explained relational problems are those problems with interpersonal relationships, besides a spouse, but including parents and friends. (Tr. 37-38).

he had been taking and added Depakote[13] and Midrin for vascular headaches. (Tr. 39-40).

Dr. Blotner confirmed he examines Claimant approximately every three weeks and stated Claimant will require medication management in addition to counseling for lifestyle adjustment "for as far into the future as I can see." (Tr. 40-41).

Dr. Blotner confirmed Claimant has been consistent in his clinical presentation. Dr. Blotner observed Claimant's condition improved during the course of his hyperbaric treatments with Dr. Harch. (Tr. 41-42). Specifically, Dr. Blotner testified the "severity of [Claimant's] symptoms decreased" during the hyperbaric treatment. (Tr. 43-44). Dr. Blotner confirmed Claimant's condition returned to the pre-hyperbaric presentation once hyperbaric treatment was discontinued. (Tr. 44).

Dr. Blotner testified that since July 1996 "from the standpoint of [Claimant's] overall functioning, for practical purposes, I would say there has been no improvement and nothing that I've been able to find to significantly improve his functioning." Dr. Blotner confirmed it is his opinion that as of July 1996, Claimant reached maximum medical improvement. (Tr. 45) Dr. Blotner confirmed his impression of Claimant's condition has not changed since the initial evaluation on March 27, 1995. (Tr. 46-47).

Dr. Blotner reviewed an employment report on Claimant from Ms. Seyler in February 1999 along with a description of each job. (Tr. 47-48). The positions included cashier, desk clerk, customer service representative, dry cleaner presser, video counter clerk, seafood picker and photo processing worker. Dr. Blotner reported in his opinion Claimant was not capable of performing any of these positions and presently is still not

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[13] Dr. Blotner explained Depakote is an anticonvulsant agent which stabilizes nerve cell membranes. The anticonvulsants have been well-documented in scientific literature to be helpful for those who have suffered brain injuries, those who have post-concussion syndrome and those who have headaches of the type described by Claimant. (Tr. 40).

capable of performing any of these positions because he does not have the physical or mental stamina to perform these jobs full time. (Tr. 49-50; CX-4). Dr. Blotner testified he does not expect Claimant's condition to improve at any time in the foreseeable future so that he would be able to perform any of these positions. (Tr. 51).

Dr. Blotner recommended continuing counseling and medication management of Claimant's physical pain and emotional suffering. (Tr. 51-52). He confirmed he has reviewed the medical records of Drs. Borresen, Salcedo, Adams, Harch, Leftwich, Culver, and Kindle along with Bayonne Hospital records. (Tr. 54). He further confirmed it is his opinion that Claimant's condition is related to the August 22, 1994 accident. (Tr. 55).

On cross-examination, Dr. Blotner affirmed that "dementia due to brain injury" is a permanent irreversible physical injury to part of the brain. (Tr. 59-60). He stated there is some controversy about the use of SPECT scans as they relate to "the meaning of what is found" from the scans, their interpretation, and how to apply the data to a question of causation. (Tr. 65). Dr. Blotner explained he did not think there is any controversy about the fact that SPECT scans image blood flow to different areas of the brain. (Tr. 62-63). He further stated that in the absence of a SPECT scan and hyperbaric treatment, his diagnosis of Claimant would be unchanged. (Tr. 61).

Dr. Blotner testified that hyperbaric oxygen treatment is a well-established treatment for divers who have brain injuries but is a new application of an old modality in treating other brain injuries, such as Claimant's head trauma injury. (Tr. 71). He reported Claimant has a biological injury to his visual cortex. (Tr. 72-73). Dr. Blotner argued Claimant has sustained a biological injury "in parts of his brain that are not measured by neurologists or neuroophthalmologists. [Claimant] is exquisitely sensitive to routine, everyday stressors, much more so than he would be without a brain injury. I believe this is the reason why fluctuations in his performance have sometimes been observed, and I'm talking about outside of this period of hyperbaric treatment." (Tr. 74).

Paul G. Harch, M.D.

Dr. Paul Harch, board-certified in emergency medicine and hyperbaric medicine, testified he is a faculty member of the

Department of Emergency Medicine and Director of the Hyperbaric Medicine Fellowship at LSU Medicine Center in New Orleans, Louisiana. He reported hyperbaric medicine is 65 to 70 percent of his practice and involves the use of high-pressure oxygen as a drug to treat physiologic processes and diseases. (Tr. 158). Dr. Harch was accepted as an expert in emergency medicine, hyperbaric treatment and SPECT scans. (Tr. 170-71).

Dr. Harch reported he employs SPECT scans in his hyperbaric medicine practice to measure brain blood flow and, derivatively, brain metabolism. (Tr. 158-59). A SPECT scan assists in diagnosis and treatment of patients with brain injuries. (Tr. 159). Dr. Harch noted he has written extensively on SPECT scan imaging and hyperbaric medicine. (Tr. 159-60).

On voir dire examination, Dr. Harch acknowledged the use of hyperbaric treatment for brain injury is not widely accepted in the medical community of the United States. (Tr. 163).

Dr. Harch reported he first examined Claimant on June 14, 1995, on a referral from Dr. Blotner. (Tr. 171-72). He received a history from Claimant which revealed Claimant had been pulling a one and one-half inch thick cable under tension from a switch box and apparently the cable suddenly disconnected, whipped back and hit Claimant obliquely across the face from his left forehead down across his nose to his right cheek. Dr. Harch noted Claimant stated the blow had "thrown him back. He was dazed, confused at the time, and eventually developed nausea and vomiting. [He] was taken to an emergency department, evaluated, and apparently had pupil dilation overnight. [He] was, kept for six nights and was diagnosed with a closed head injury and head trauma, and then had some problems on the flight home." (Tr. 172-73).

Dr. Harch testified Claimant reported he could not drive, read or watch television because his vision was "terrible." (Tr. 173). Claimant said his nerves were "shot. He was jumpy, irritable." Claimant had to declare bankruptcy and had bilateral ringing in his ears since the moment of impact. Claimant also had a constant headache. (Tr. 175). He complained of dizziness, photophobia to bright lights, difficulty understanding people and their speech, short-term memory loss, stuttering, generalized fatigue, stumbling, difficulty cognitively, mood swings, impatience and poor sleep. (Tr. 176).

Upon examination, Dr. Harch opined Claimant had a closed

head injury[14] and prescribed hyperbaric oxygen therapy for Claimant. (Tr. 177). Before the first hyperbaric treatment, a SPECT scan was taken on Claimant. (Tr. 179). The initial hyperbaric treatment was performed on August 29, 1995 after which a post-SPECT scan was then ordered. (Tr. 180). Dr. Harch explained comparing the prehyperbaric treatment SPECT scan and post-hyperbaric treatment SPECT scan assists him in determining "if a single dose of hyperbaric oxygen can positively impact the patient and the appearance of brain function . . . ." (Tr. 182).

Dr. Harch observed Claimant's pre-hyperbaric treatment SPECT scan was abnormal in that there were asymmetries in the his brain between his left hemisphere and right hemisphere. (Tr. 186). Claimant's post-hyperbaric treatment SPECT scan was improved as the left hemisphere had a dramatic improvement in profusion to be more symmetrical with the right hemisphere. (Tr. 189). Dr. Harch reported Claimant had a total of 80 hyperbaric treatments.[15] (Tr. 190).

Dr. Harch testified Claimant's "overall" vision was better after the hyperbaric treatments, but he was unable to do his normal activities due to his visual problems. Claimant stated he was able to watch television, but could not drive and read. He further stated his nervousness and irritability had improved and the ringing in his ears had decreased. (Tr. 191). He stated the constant headaches had decreased and there was now "more of a numbness instead of pain." (Tr. 191-92). A SPECT scan was taken on April 22, 1996 and Dr. Harch interpreted it as an improvement in brain blood flow. (Tr. 193). On July 6, 1996, another SPECT scan was taken and "it looked a little worse . . . ." (Tr. 196-97).

Dr. Harch opined additional hyperbaric treatment at this time "might help some, but I don't know that it would be very effective necessarily." (Tr. 197). Dr. Harch observed

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[14] Dr. Harch explained a closed head injury refers to an injury to the brain without disruption of the skull. (Tr. 178).

[15] Dr. Harch explained 80 hyperbaric treatments were initiated on Claimant after a study had revealed patients were "unequivocally better" after 80 hyperbaric treatments had been initiated. (Tr. 192).

hyperbaric treatment is used to treat underlying organic conditions. If a psychiatric condition resulted from an organic brain injury, hyperbaric treatment may "very possibly treat" the psychiatric condition. (Tr. 198).

Dr. Harch confirmed it is not his testimony that Claimant "had a closed head injury based solely on the SPECT scan image." (Tr. 199). He further confirmed he had no reason to believe Claimant was malingering. (Tr. 200). Dr. Harch testified Claimant's clinical condition is "partly" related to his August 22, 1994 accident. Dr. Harch observed Claimant had sustained "multiple other head injuries . . . [Claimant] had a number of brain injuries in the past with hospital admissions and so on. And [the August 22, 1994 accident] was just the last of a series of significant blows to the head." (Tr. 201-02).

Dr. Harch explained the brain has a certain degree of redundancy, or reserve capacity, but every time a loss of consciousness occurs, there is a loss of some reserve capacity. (Tr. 202).

On cross-examination, Dr. Harch confirmed depression and alcohol can cause an abnormal SPECT scan. (Tr. 204).

Emergency Physicians' Center

Between January 8, 1996 and April 19, 1996, Claimant received 80 hyperbaric treatments at Emergency Physicians' Center. The diagnosis was a closed head injury and Claimant consistently "tolerated well without adverse reaction" the hyperbaric treatment. (CX-6, pp. 16-103). In a summary of the hyperbaric treatments, Dr. Harch reported on May 22, 1996, "after 80 hyperbaric treatments [Claimant] seems to be improved and I await the psychometric testing to include in his final analysis. At this point, only time will tell the proportion of transient versus permanent changes that have occurred and whether he might benefit from additional intermittent short courses of hyperbaric treatment in the future. It will be difficult to say . . . ." (CX-6, p. 2).

Rennie W. Culver, M.D.

Dr. Rennie Culver, board-certified in general psychiatry and assistant clinical professor of Psychiatry at LSU Medical School and Tulane Medical School, testified by deposition dated

July 27, 2000. Dr. Culver testified 80 to 90 percent of his practice is in forensic psychiatry with most of his time spent performing independent medical examinations. (EX-K, pp. 6-7). He is a professor of forensic psychiatry at Tulane Medical School and teaches a seminar in the detection of malingering. (EX-K, p. 8). Dr. Culver was accepted by the parties as an expert in the field of forensic psychiatry. (EX-K, p. 10).

Dr. Culver reported the standard protocol for diagnosing a mild traumatic brain injury involves examining the patient, obtaining a history and administering electrodiagnostic and radiologic tests, such as an MRI, a CAT scan or an EEG. He noted most of the time, neuropsychological tests are administered and are combined with general psychological tests, such as a Rorschach ink blot test, MMPI or Milan Clinical Multiaxial Inventory (MCMI). (EX-K, p. 11).

Dr. Culver stated a mild brain injury is classified as an injury which, among other things, did not result in a loss of consciousness of 30 minutes or longer. He reported the Glascow coma scale[16] rating should be considered when diagnosing a brain injury. (EX-K, p. 13). A score of 13 to 15 indicates an individual has, by definition, a mild or minor head injury. He further reported an individual with amnesia of less than twenty-four hours is indicative of mild or minor head injury. (EX-K, p. 14). Dr. Culver explained a closed head injury is a brain injury of any degree whereas a concussion is, by definition, a brain injury of mild degree. (EX-K, p. 15).

Dr. Culver testified regarding SPECT scans that he would defer to the position of the American Academy of Neurology in which SPECT scans are considered “a potentially useful research tool, but its clinical utility in making diagnosis of anything has not been prudent.” He reported he does not rely on SPECT scans in the course of his practice in diagnosing brain injuries. (EX-K, p. 18).

Dr. Culver maintained he has never utilized hyperbaric treatments with patients who have sustained brain injuries.

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[16] Dr. Culver explained the Glascow coma scale rating is an assessment of the level of consciousness and responsiveness of an individual following a head injury. (EX-K, p. 13).

(EX-K, p. 19). He stated he would defer to a neurologist as to the usefulness of hyperbaric treatments. (EX-K, p. 20). He considered hyperbaric treatments "efficacious only in the relatively early stages following the injury. I don't know what value it would be once the patient has essentially recovered and reached whatever plateau he or she is going to reach as a result of a head injury . . . Personally I have not referred anyone I have ever treated for hyperbaric treatments." (EX-K, p. 21).

On cross-examination, Dr. Culver confirmed he has never held himself out as an expert in interpreting SPECT scans or hyperbaric treatment. (EX-K, p. 66).

Dr. Culver reported his only evaluation of Claimant occurred on November 5, 1996, on a referral from May Ann Doussard, a rehabilitation specialist with INTRACORP. (EX-K, pp. 22-23, 67). He was provided with the records of Drs. Harch, Borresen, Leftwich, Florek, Calkwood, Kindle, Mains and Salcedo which he reviewed on November 16, 1996. (EX-K, p. 24). Claimant reported his father has not worked "in a very long time," his mother had some health problems and his wife was receiving social security disability benefits. (EX-K, pp. 28, 34). Dr. Culver confirmed Claimant mentioned he was accident prone in childhood and adolescence. (EX-K, p. 29). He testified Claimant is "in the average range intellectually, average IQ." (EX-K, p. 31). He reported Claimant denied any suicide attempts. (EX-K, p. 32).

Dr. Culver administered the Mental Status Examination to Claimant which is a series of standardized questions designed to determine the gross functioning of the patient at the time of examination. (EX-K, p. 35). He observed Claimant "is not the least bit disoriented. He had no problem with recent or remote memory." (EX-K, p. 36).

Dr. Culver testified the DSM-IV delineates five axes for evaluation. Along Axis I, Claimant had undifferentiated somatoform disorder, or psychosomatic problems. Dr. Culver alternatively explained Claimant "is a fake. He is malingering." (EX-K, pp. 3738). Along Axis II, Claimant had a personality disorder. (EX-K, p. 38). Along Axis III, Claimant has a history of head injuries. Dr. Culver did not comment on Axes IV or V because they are not clinical axes and do not involve diagnosis. (EX-K, p. 39).

Dr. Culver confirmed he recently reviewed a report by Dr.

Adams and a surveillance videotape (EX-H, Tape #5) of Claimant and believes Claimant is malingering. (EX-K, pp. 41-42, 45, 68-69, 79). In the surveillance videotape, Claimant's engaging in normal activities led Dr. Culver to think there was nothing at all wrong with Claimant. (EX-K, p. 45). Dr. Culver also pointed to some of Claimant's writings. He noted "patients who are faking symptoms deliberately and consciously find it difficult to keep up the act because there is a normal pull of reality that draws them back to what they are normally capable of doing. What happened was that he started writing in a manner that indicated that he had something terribly wrong with his vision. He couldn't see. He very theatrically looks an inch from the paper and writes in very large letters as if it's very laborious for him to do so . . . the writing got smaller and smaller to the point it was down to the normal size that anyone would write in." (EX-K, pp. 43-44).

Furthermore, Dr. Culver noted if ophthalmologists and neurologists cannot explain Claimant's vision problems "either [Claimant is] faking it or he's having some kind of psychosomatic or somatoform disorder." (EX-K, p. 47). Dr. Culver noted neuropsychological testing today is not complete without malingering tests having been administered. (EX-K, p. 58).

Dr. Culver opined there are no residual effects from the concussion Claimant sustained on August 22, 1994 as "concussion virtually always results in an excellent prognosis and complete recovery." (EX-K, p. 46).

Dr. Culver confirmed he received a list of possible job positions for Claimant from Ms. Carla Seyler in January 1999. The list included desk clerk, customer service representative, dry cleaner presser, video rental clerk, seafood picker and photo processor. (EX-K, p. 64). Dr. Culver reported he "could find no reason why [Claimant] would be unable to [perform these jobs]." He further confirmed in his opinion the degree of Claimant's anxiety is not disabling such that he is unable to return to his former occupation or any type of occupation. (EX-K, pp. 65, 80, 84).

Donald S. Adams, M.D.

Dr. Donald Adams, board-certified in psychiatry and neurology and assistant clinical professor of Neurology at

Tulane Medical School, testified by deposition dated May 16, 2000. (EX-O, p. 4). Dr. Adams evaluated Claimant on January 23, 1997, at the request of Carrier. (EX-O, p. 8). He obtained a history from Claimant which revealed Claimant was twenty-six years of age and had been struck above the left eye and across the nose by a cable on August 22, 1994. (EX-O, pp. 8, 12-13). Claimant stated he was dazed, but not knocked-out. He immediately complained of loss of half his vision and severe headaches. "He described being dizzy, having difficulty thinking clearly and having ringing in his ears. He didn't recall at the time what he had been told during the course of that hospitalization, but did tell me he had been told he had a bad brain injury . . . ." (EX-O, p. 13).

Dr. Adams observed Claimant had received hyperbaric treatments and reported receiving some benefit from the treatments. Claimant stated his problems with his vision and his headaches were the two items that bothered him the most. "He described the headaches as constant, daily, associated with nausea and not relieved by anything he had been given or any treatment that had been prescribed." (EX-O, pp. 14-15). "He described his vision as being as though everything was smeared or blurred. He described this as a problem that had gotten better to some extent with the hyperbaric oxygen, whereas the headaches had not. He told me his vision was sufficiently bad that he couldn't pass an eye test and therefore, did not drive. Aside from that, the tinitis (sic) affected both ears, while it had diminished, it was still present. And his equilibrium was bad . . . He said his memory was terrible. He said that he couldn't concentrate, that he couldn't read. He also noticed a presence of persistent temper, which he stated had not been present before the accident." (EX-O, p. 15).

Dr. Adams testified Claimant reported past brain injuries playing football and falling-off a trampoline. (EX-O, pp. 15-16). Claimant denied drinking to excess but admitted using street drugs in high school. (EX-O, p. 16).

Dr. Adams stated he "didn't test [Claimant's] vision acuity. I thought it was rather odd that he told me, I think at length how bad his vision was, yet he managed to fill out the patient information sheet, which requires reading it yourself. He told me he couldn't read. He filled this out without . . . any help doing it . . . ." (EX-O, pp. 20-21). Dr. Adams noted Claimant's neuropsychological test results "showed perfectly

average or actually good responses in parts of tests requiring visual spatial organization, which is basically a test requiring copying figures. So [Claimant] could certainly see well enough and in enough detail to do it, so those [tests] . . . are substantiated before I saw him. There was no substantiation to the claims he had a very poor memory and concentration." (EX-O, pp. 25-26).

Dr. Adams reported he agreed with Dr. Borreson's opinion that Claimant's symptoms were emotionally based and Claimant had no brain injury of lasting significance. (EX-O, p. 27).

Dr. Adams explained a closed head injury is typically diagnosed primarily on the basis of history. The most common form of closed head injury stems from a concussion where an individual was unconscious or stunned. He further explained magnetic resonance imaging is used to diagnose a brain injury. (EX-O, p. 7).

Dr. Adams testified he was not aware of any commonly accepted standards for using SPECT scans in diagnosing mild brain injuries. (EX-O, p. 34). He further testified SPECT scans are not generally accepted by neurologists and the medical society for diagnosing mild brain injuries or closed head injuries. (EX-O, p. 35).

Dr. Adams stated there was no "possible physical basis" for Claimant's complaints and he opined there was no logical or physical medical treatment he could provide Claimant. (EX-O, pp. 36-37). He reported he would place no limitations from a physical perspective on Claimant returning to work. (EX-O, pp. 37, 47, 48).

Dr. Adams reported the symptoms Claimant experienced as a result of the August 22, 1994 accident would not necessarily be substantially greater because of his prior head traumas. (EX-O, pp. 40-41).

The Vocational Evidence

Nathaniel Fentress

Mr. Nathaniel Fentress was accepted as an expert in the field of vocational rehabilitation. Mr. Fentress testified he

interviewed and evaluated Claimant on March 15, 2000, to determine whether Claimant had the presence of any physical and/or mental impairments which were vocationally disabling and whether Claimant could return to his usual occupation as an electrician and if not, what other types of positions he may be capable of performing. (Tr. 81-82).

Mr. Fentress received a history from Claimant which revealed Claimant was a resident of Morgan City, Louisiana, and lived in Assumption Parish. Claimant was married with no children. For an overall global understanding of Claimant's medical condition and to make a determination regarding Claimant's employability, Mr. Fentress testified he reviewed Claimant's medical records from Drs. Borresen, Salcedo, Blotner, Leftwich, Calkwood, Kindle, Harch, Adams and Culver along with the medical records from West Jefferson Medical Center. (Tr. 82).

Mr. Fentress determined Claimant had a head injury with ongoing treatment since the date of the head injury of August 22, 1994. Mr. Fentress observed Dr. Blotner reported Claimant experienced dementia, mood disorders, anxiety, depression and chronic headaches. Mr. Fentress testified he delivered a report from his findings. (Tr. 83).

Mr. Fentress observed Claimant was twenty-nine years old at the time of the injury, was a high school graduate and had attended an electrician's training program. He noted Claimant's age and education were good factors for returning to work. However, he acknowledged a "downside" in that Claimant had not been released by Dr. Blotner to return to work and Claimant had dementia, mood disorder, anxiety and depression. (Tr. 84).

Mr. Fentress reported administering the Wide Range Achievement Test to Claimant which measures ability to read, spell and perform arithmetic. Claimant scored an 82 in reading, which is in the seventh-grade level, he scored an 82 in spelling, which is in the sixth-grade level and he scored a 98 in arithmetic, which is on a high school level. (Tr. 85-86).

Mr. Fentress testified he performed a transferable skills analysis of Claimant and determined he was not capable of transferring his skills to more sedentary jobs due to his ongoing psychiatric problems. Mr. Fentress noted the positions which had been proposed to Dr. Blotner, such as cashier, desk clerk, customer service representative and dry cleaner presser, were far below Claimant's skill level which he had developed in

working as an electrician. Moreover, Dr. Blotner had not approved these positions. (Tr. 87, 94-95).

Mr. Fentress stated Claimant is "probably totally vocationally disabled from significant gainful employment, substantial significant gainful employment." He explained "substantial significant gainful employment" referred to "working eight hours a day, five days a week." (Tr. 90). He confirmed that at the present time there is no vocational training he would recommend to Claimant which could possibly provide him with an opportunity for significant substantial gainful employment. He indicated Claimant's mental condition would need to improve for him to provide an evaluation that Claimant may return to gainful employment. (Tr. 91).

Carla Seyler

Ms. Carla Seyler was accepted as an expert in the field of vocational rehabilitation counseling. (Tr. 208). She reported being a vocational rehabilitation counselor for twenty-two years and had evaluated Claimant on November 3, 1998. She "conduct[ed] a detailed rehabilitation interview and vocational testing, generally consisting of academic skills testing, and . . . review[ed] all the file materials provided . . . ." Ms. Seyler conducted a labor market survey and researched the area regarding any vocational resources that Claimant might require. (Tr. 209).

Ms. Seyler testified she met with Claimant between an hour and a half and two hours and he was "very cordial, communicated well. He had no difficulty interacting with me." She observed he indicated he was still having headaches and had some difficulty with his balance at times. He mentioned problems with his vision and at times he falls when walking. (Tr. 210). She reviewed the medical records of Drs. Blotner, Harch, Culver, Borresen, Kindle, Salcedo, Calkwood, Adams and Leftwich. (Tr. 213).

Ms. Seyler reported administering The Woodcock Johnson test on Claimant for letter-word identification. Claimant obtained a 16.9 grade level on recognition and word pronunciation, a 9.2 grade level on reading comprehension, an 11.4 grade level on calculation and a 13.1 grade level on applied problems. Ms. Seyler noted Claimant held the test booklet about six inches from his face, but he had no problem completing the tests. (Tr. 211).

Ms. Seyler conducted a labor market survey in the Morgan City, Louisiana area. She observed Claimant had some difficulty with transportation. (Tr. 213). She reported only considering positions where Claimant would not have to work around dangerous machinery or require him to have fine visual acuity. (Tr. 214). She identified positions in the Morgan City, Louisiana area which paid between $5.15 and $6.50 per hour such as cashier, desk clerk, customer service representative, dry cleaner presser, video counter clerk, seafood picker and photo-processing worker. She opined these positions would be considered "low stress" and observed there were agencies which can assist Claimant with transportation to work. (Tr. 215).

Ms. Seyler observed there are devices, such as a Zoom program, which can help Claimant's visual problems if he is working at a computer. She noted the program can cost between $400.00 and $600.00, and she reported Claimant's workers' compensation carrier was receptive to providing the program. (Tr. 217-18).

Ms. Seyler testified she provided Dr. Blotner with the job descriptions of the positions she identified and Dr. Blotner did not approve the positions for Claimant. She observed Dr. Blother stated "I don't think [Claimant] has the physical or mental stamina to perform these jobs." (Tr. 220; CX-4). She reported she would "probably not" place an individual back into a work environment when his treating physician provided an opinion that the individual is not capable of performing that type of job. (Tr. 220-21).

Ms. Seyler stated Dr. Culver approved all the positions she identified for Claimant. She acknowledged Dr. Culver had examined Claimant on one occasion. (Tr. 221). She reported she could not place Claimant in any job because his treating physician opined he cannot perform the work. (Tr. 222).

The Contentions of the Parties

Claimant contends he suffered a work-related accident on August 22, 1994, and as a result, he sustained a closed head injury which has rendered him permanently and totally disabled. Furthermore, Claimant contends he is entitled to receive continuing medical benefits and cost-of-living increases retroactive to July 1996, the date he should be deemed permanently and totally disabled.

Employer/Carrier, on the other hand, contend Claimant has not carried his burden of proof that the August 22, 1994 incident caused a disabling condition. Employer/Carrier assert Dr. Blotner's diagnosis must be disregarded as it ignores well-established guidelines for diagnosing brain injuries. Employer/Carrier further assert surveillance video clearly shows Claimant to be an active man who is not disabled. Alternatively, Employer/Carrier argue entitlement to Section 8(f) relief due to Claimant's remarkable history of prior head trauma.

IV. DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J.V. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof. Director, OWCP v. Greenwich Collieries, 512 U.S. 267 (1994), aff'g. 990 F.2d 730 (3rd Cir. 1993).

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 91 (5th Cir. 1988); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 661 F.2d 898, 900 (5th Cir. 1981); Banks v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968).

A. Prima Facie Case

Section 20(a) of the Act, 33 U.S.C. Section 920(a), creates a presumption that a claimant's disabling condition is causally related to his employment. In order to invoke the Section 20(a) presumption, a claimant must prove that he suffered a harm and that conditions existed at work or an accident occurred at work that could have caused, aggravated or accelerated the condition. Merrill v. Todd Pacific Shipyards Corp., 25 BRBS 140 (1991); Stevens v. Tacoma Boat Building Co., 23 BRBS 191 (1990).

A claimant's **credible** subjective complaints of symptoms and pain can be sufficient to establish the element of physical harm necessary for a prima facie case and the invocation of the Section 20(a) presumption. See Sylvester v. Bethlehem Steel Corp., 14 BRBS 234, 236 (1981), aff'd sub nom. Sylvester v. Director, OWCP, 681 F.2d 359, 14 BRBS 984 (5th Cir. 1982).

In the present matter, Claimant has established sufficient evidence to invoke the Section 20(a) presumption. Substantial medical evidence establishes that Claimant sustained a closed head injury in a work-related accident on August 22, 1994. Claimant has consistently complained of headaches, vision problems, dizziness and concentration problems since the August 22, 1994 accident. Dr. Blotner, Claimant's treating physician, credibly opined it is his opinion that Claimant's complaints are related to his August 22, 1994 work-related accident.

Thus, Claimant has established a prima facie case that he suffered an "injury" under the Act, having established that he suffered a harm or pain on August 22, 1994, and that his working conditions and activities could have caused the harm or pain for causation sufficient to invoke the Section 20(a) presumption. Cairns v. Matson Terminals, Inc., 21 BRBS 252 (1988).

Once the presumption is invoked, the burden shifts to the employer to rebut the presumption with substantial evidence to the contrary which establishes that the claimant's employment did not cause, contribute to or aggravate his condition. James v. Pate Stevedoring Co., 22 BRBS 271 (1989); Peterson v. General Dynamics Corp., 25 BRBS 71 (1991); see also Conoco, Inc. v. Director, OWCP, 194 F.3d 684, 690, 33 BRBS 187, 191 (CRT) (5th Cir. 1999). "Substantial evidence" means evidence that reasonable minds might accept as adequate to support a conclusion. E & L Transport Co. v. N.L.R.B., 85 F.3d 1258 (7th Cir. 1996).

An employer must produce facts, not speculation, to overcome the presumption of compensability. Reliance on mere hypothetical probabilities in rejecting a claim is contrary to the presumption created by Section 20(a). See Smith v. Sealand Terminal, 14 BRBS 844 (1982).

When aggravation of or contribution to a pre-existing condition is alleged, the presumption still applies, and in order to rebut it, the employer must establish that the claimant's condition was not caused or aggravated by his

employment. Rajotte v. General Dynamics Corp., 18 BRBS 85 (1986).

In the instant case, Employer/Carrier has presented substantial countervailing evidence to rebut the presumption that Claimant's employment did not cause, contribute to, or aggravate his condition.

Employer/Carrier presented the medical records of five physicians to rebut the Section 20(a) presumption. Dr. Borresen opined Claimant was not disabled from the August 22, 1994 accident. Dr. Leftwich opined there was no physiological reason for Claimant's vision problems. Dr. Calkwood noted Claimant was contradictory in his evaluation. Thus, Dr. Calkwood opined Claimant was suffering from a post-concussion syndrome with an hysterical component. Dr. Culver opined Claimant was malingering based on what he observed in the surveillance videos. Dr. Adams opined there was no possible physical basis for Claimant's complaints. Because Employer/Carrier has presented substantial countervailing evidence through the opinions of these five physicians to rebut the presumption that Claimant's employment did not cause, contribute to, or aggravate his condition, Employer/Carrier has met its burden in rebutting the Section 20(a) presumption. See James, supra.

Once the Section 20(a) presumption is rebutted, it falls out of the case and the administrative law judge must then weigh all the evidence and resolve the case based on the record as a whole. Noble Drilling Co. v. Drake, 795 F.2d 478 (5th Cir. 1986); Hislop v. Marine Terminals Corp., 14 BRBS 927 (1982). This rule is an application of the "bursting bubble" theory of evidentiary presumptions, derived from the United States Supreme Court's interpretation of Section 20(d) of the Act. See Del Vecchio v. Bowers, 296 U.S. 280 (1935); see also Brennan v. Bethlehem Steel Corp., 7 BRBS 947 (1978) (applying Del Vecchio to Section 20(a)).

In evaluating the evidence, the fact-finder is entitled to weigh the medical evidence and draw his own inferences from it and is not bound to accept the opinion or theory of any particular medical examiner. Todd Shipyards Corp. v. Donovan, 300 F.2d 741 (5th Cir. 1962). It is solely within the discretion of the administrative law judge to accept or reject all or any part of any testimony according to his judgment. Poole v. National Steel & Shipbuilding Co., 11 BRBS 390 (1979).

In light of the medical and testimonial evidence, I find Claimant has met his burden in establishing that he suffered a disabling injury under the Act from the August 22, 1994 work accident.

The medical reports of two neurologists, two psychiatrists, one neuro-ophthalmologist, one ophthalmologist, one psychologist and one physician specializing in hyperbaric medicine have been submitted in this matter. Employer/Carrier presented the medical opinion of Dr. Borresen, a neurologist, who had examined Claimant on several occasions since February 1987. Dr. Borresen reported he did not employ SPECT scans in his practice as they were not "very helpful" to him, nor did he employ hyperbaric treatments as he did not feel they were a standard or proven treatment. In arriving at his opinion that Claimant was not disabled from the August 22, 1994 accident, Dr. Borresen observed a CT scan of Claimant's brain revealed no abnormalities. However, Dr. Borresen never reported he felt Claimant was malingering. He testified he would defer to Dr. Salcedo, a licensed clinical psychologist, for that determination. Dr. Borresen acknowledged Claimant had an abnormality in the right peripheral vestibular, which is a balance organ in his right inner ear. Dr. Borresen acquiesced that this diagnosis would be consistent with Claimant's complaints of dizziness and would be an organic basis for his complaints.

Claimant presented the evaluations of Dr. Salcedo who administered two neuropsychological batteries to Claimant with the first battery of tests occurring on November 19, 1994 and the second battery of tests occurring on May 10, 1996. Dr. Salcedo opined Claimant's emotional symptoms are not atypical among individuals with head injuries. Dr. Salcedo observed Claimant scored poorly on the neuropsychological batteries, but Dr. Salcedo attributed the low scores to Claimant's visual problems and, therefore, did not consider Claimant's scores valid. Therefore, he opined Claimant's visual problems prevent him from returning to gainful employment. Dr. Salcedo reported he did not feel Claimant was malingering as Claimant's complaints had been consistent for six years and "it's difficult to maintain this type of facade or charade for six years without someone not noticing the inconsistencies."

Employer/Carrier offered the medical opinions of Drs. Leftwich and Calkwood. Dr. Leftwich, an ophthalmologist, performed six examinations on Claimant and determined "from an

ophthalmologic standpoint, there was no physiological reason for [Claimant's] loss of vision." Therefore, Dr. Leftwich referred Claimant to Dr. Calkwood, a neuro-ophthalmologist, to whom he would defer with regard to the cause of Claimant's vision problems. Dr. Calkwood performed one examination of Claimant and determined Claimant was suffering from a post-concussive syndrome with an hysterical component based upon several pieces of contradictory data provided by Claimant.

Claimant proffered the medical opinion of Dr. Harch, Director of the Hyperbaric Medicine Fellowship at LSU Medicine Center, who conducted the eighty hyperbaric treatments on Claimant. Dr. Harch reported he employs SPECT scans in his practice to measure brain blood flow and, derivatively, brain metabolism. He further reported he employs hyperbaric oxygen treatment to treat physiologic processes and diseases. Dr. Harch has written extensively on SPECT scan imaging and hyperbaric medicine. Dr. Harch testified it was his opinion that the hyperbaric treatments were assisting Claimant with his closed head injury as Claimant's post-hyperbaric treatment SPECT scans showed more symmetry between the hemispheres of Claimant's brain. Furthermore, the hyperbaric treatments appeared to be helping Claimant's overall vision. Dr. Harch reported he did not believe Claimant was malingering. He further testified Claimant's clinical condition is partly related to his August 22, 1994 accident which was just the last of a series of significant blows to the head.

Employer/Carrier proffered the medical opinions of Drs. Culver and Adams. Dr. Culver stated he does not employ SPECT scans or hyperbaric treatment in his practice. However, he stated he would defer to a neurologist as to the usefulness of hyperbaric treatments. Dr. Culver performed one examination on Claimant and stated, based on what he observed in the surveillance video, that Claimant was malingering. Dr. Adams, a neurologist and professor of Neurology at Tulane Medical School, performed one examination on Claimant. Dr. Adams stated Claimant's neuropsychological test results showed Claimant could see well enough and in enough detail to complete a pre-examination questionnaire. He agreed with Dr. Borresen that Claimant's symptoms were emotionally based and Claimant did not sustain a brain injury of lasting significance. Dr. Adams based his opinions on his evaluations of Claimant and his review of the medical record.

Claimant provided the medical opinion of his treating

physician, Dr. Blotner, who is board-certified in psychiatry and pain management. Dr. Blotner testified Claimant's complaints have been consistent. He noted Claimant's condition improved during hyperbaric treatments. He testified Claimant has a biological injury to his visual cortex and other parts of his brain not measured by neurologists or neuro-ophthalmologists. Dr. Blotner reported Claimant had reached maximum medical improvement by July 1996 after the hyperbaric treatments had ended. Dr. Blotner noted Ms. Seyler had presented a labor market survey and he rejected the job positions as Claimant cannot perform any of the positions. Dr. Blotner confirmed he reviewed all the medical records in this case and opined Claimant will need continuing counseling and medicinal management for his physical pain and emotional suffering. Dr. Blotner further confirmed it is his opinion that Claimant's closed head injury is related to the August 22, 1994 work accident.

I find the weight of the credible medical and testimonial evidence indicates Claimant's symptoms are consistent with a closed head injury which are the result of his August 22, 1994 work accident.

Initially, I note most of the physicians who opined Claimant was not disabled from the August 22, 1994 work accident only examined Claimant on one occasion. These physicians include Drs. Calkwood, Culver and Adams. Dr. Leftwich examined Claimant on six occasions and Dr. Borresen examined Claimant on several occasions as Claimant's treating physician until turning over medicinal management of Claimant to Dr. Blotner. Those physicians who determined Claimant was disabled from the August 22, 1994 work accident examined Claimant on several occasions. Dr. Blotner was Claimant's treating physician, Dr. Harch conducted the eighty hyperbaric treatments and Dr. Salcedo administered two neuropsychological batteries to Claimant.

Claimant's complaints of headaches, vision problems, dizziness and concentration problems have been consistent since the August 22, 1994 work accident. Furthermore, Drs. Blotner, Harch and Salcedo opined Claimant was not malingering. Claimant's initial treating physician, Dr. Borresen, stated he would defer to Dr. Salcedo for a determination of whether Claimant was malingering.

Dr. Borresen testified the abnormality in the right peripheral vestibular, which is a balance organ in Claimant's

right inner ear, produces a diagnosis that is consistent with his complaints of dizziness and would be an organic basis for his complaints.

The surveillance videos submitted by Employer/Carrier are not dispositive of any issues in this matter. Claimant was consistent in his activities throughout the five-plus years of video surveillance. Although Employer/Carrier argue Claimant stated he could not drive and in one instance Claimant was filmed driving a truck from one end of his driveway to the other end, Claimant testified at the hearing he would occasionally move cars around in his driveway. There are no instances of Claimant driving automobiles any farther than his driveway. Furthermore, Claimant is moving slowly and wearing sunglasses in most of the surveillance videos. Dr. Culver opined from his viewing of the surveillance video, Claimant was malingering. Notwithstanding the fact that Dr. Culver only examined Claimant on one occasion and three other physicians credibly opined Claimant was not malingering, I find Dr. Culver's opinion to be unreasoned in light of his reliance on the surveillance video, in which Claimant acts consistent with his testimony.

Dr. Salcedo and Dr. Blotner, Claimant's treating physician, opined Claimant's condition was related to the August 22, 1994 work accident. In determining disability, it is well-settled that "the opinions, diagnoses and medical evidence of a treating physician who is familiar with the claimant's injuries, treatment and responses should be accorded considerable weight." See, e.g., Loza v. Apfel, 219 F.3d 378, 395 (5th Cir. 2000). Dr. Blotner has been Claimant's treating physician since April 3, 1995. He has credibly opined Claimant cannot return to work due to his brain injury and needs continuing counseling and medicinal management for his physical pain and emotional suffering based upon Claimant's consistent clinical presentation. Thus, based on a review of all the medical evidence of record, I find Claimant's closed head injury is the result of the August 22, 1994 work-related accident. Therefore, I find and conclude that Claimant has met his burden in establishing he suffered a harm at work which caused his continuing symptoms. See Merrill, supra.

B. Nature and Extent of Disability

The burden of proving the nature and extent of disability rests with the claimant. Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56, 59 (1980).

Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept. Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for a claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage-earning capacity.

Permanent disability is a disability that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. Watson v. Gulf Stevedore Corp., 400 F.2d 649, pet. for reh'g denied sub nom. Young & Co. v. Shea, 404 F.2d 1059 (5th Cir. 1968)(per curiam), cert. denied, 394 U.S. 876 (1969); SGS Control Services v. Director, OWCP, 86 F.3d 438, 444 (5th Cir. 1996). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. Trask, 17 BRBS at 60. Any disability suffered by a claimant before reaching maximum medical improvement is considered temporary in nature. Berkstresser v. Washington Metropolitan Area Transit Authority, 16 BRBS 231 (1984); SGS Control Services, 86 F.3d at 443.

The question of extent of disability is an economic as well as a medical concept. Quick v. Martin, 397 F.2d 644 (D.C. Cir 1968); Eastern S.S. Lines v. Monahan, 110 F.2d 840 (1st Cir. 1940); Rinaldi v. General Dynamics Corporation, 25 BRBS 128, 131 (1991).

To establish a prima facie case of total disability, the claimant must show that he is unable to return to his regular or usual employment due to his work-related injury. Elliott v. C & P Telephone Co., 16 BRBS 89 (1984); Harrison v. Todd Pacific Shipyards Corp., 21 BRBS 339 (1988); Louisiana Insurance Guaranty Association v. Abbott, 40 F.3d 122, 125 (5th Cir. 1994). A claimant's present medical restrictions must be compared with the specific requirements of his usual or former employment to determine whether the claim is for temporary total or permanent total disability. Curit v. Bath Iron Works Corp., 22 BRBS 100 (1988). Once a claimant is capable of performing

his usual employment, he suffers no loss of wage-earning capacity and is no longer disabled under the Act.

The traditional method for determining whether an injury is permanent or temporary is the date of maximum medical improvement (MMI). See Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235, ftn 5. (1985); Trask v. Lockheed Shipbuilding Construction Co., supra; Stevens v. Lockheed Shipbuilding Company, 22 BRBS 155, 157 (1989). The date of MMI is a question of fact based upon the medical evidence of record. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); Williams v. General Dynamics Corp., 10 BRBS 915 (1979).

An employee reaches MMI when his condition becomes stabilized. Cherry v. Newport News Shipbuilding & Dry Dock Co., 8 BRBS 857 (1978); Thompson v. Quinton Enterprises, Limited, 14 BRBS 395, 401 (1981).

In the present matter, nature and extent of disability and MMI will be treated concurrently for purposes of explication.

As detailed above, I find and conclude Claimant has established he has suffered a disabling injury under the Act. Dr. Blotner, Claimant's treating physician, has consistently and credibly opined that Claimant is not only unable to return to his regular or usual employment but is unable to perform any job as he does not have the physical or mental stamina to do so. Dr. Blotner further opined Claimant had reached MMI as of July 1996, upon the conclusion of Claimant's hyperbaric treatments. Dr. Borresen, Claimant's initial treating physician, testified Claimant had reached MMI when he examined Claimant on September 5, 1996. I find Claimant reached MMI upon the conclusion of his last hyperbaric treatment on April 19, 1996, as the testimony of Dr. Blotner indicates Claimant's condition had stabilized at that time. See Cherry, supra. Mr. Fentress, a vocational expert, credibly stated Claimant's mental condition would need to improve for him to become employable. Moreover, Ms. Seyler, a vocational expert, testified she would not recommend Claimant for any positions as long as his treating physician maintained Claimant was unable to work.

In view of the foregoing, I find that Claimant is totally disabled under the Act from August 22, 1994, and continuing, as Dr. Blotner, Mr. Fentress and Ms. Seyler have credibly testified Claimant is unable to return to work. I further find Claimant was temporarily totally disabled under the Act from August 22,

1994 until April 19, 1996 when he reached MMI. Finally, I find Claimant is permanently totally disabled from April 19, 1996 to present and continuing since he is unable to perform his former job or any alternative work. Therefore, I find and conclude the weight of the credible medical and testimonial evidence supports the conclusion that Claimant is entitled to temporary total disability benefits from August 22, 1994 to April 19, 1996, and permanent total disability from April 19, 1996 to present and continuing based upon his average weekly wage of $372.94.

C. Medical Benefits

Pursuant to Section 7(a) of the Act, the employer is liable for all medical expenses which are the natural and unavoidable result of the work injury. In order for an employer to be liable for a claimant's medical expenses, the expenses must be reasonable and necessary. Parnell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). A claimant has established a prima facie case for compensable medical treatment where a qualified physician indicates treatment is necessary for a work-related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255 (1984). Section 7 does not require that an injury be economically disabling in order for the claimant to be entitled to medical benefits, but only that the injury be work-related and the medical treatment be appropriate for the injury.

An employer found liable for the payment of compensation is responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. Perez v. Sea-Land Services, Inc., 8 BRBS 130 (1978). Entitlement to medical benefits is never time-barred where a disability is related to a compensable injury. Weber v. Seattle Crescent Container Corp., 19 BRBS 146 (1986).

Claimant contends that Employer/Carrier should be liable for the medical expenses related to his August 22, 1994 work accident, including treatment for his vision problems, concentration problems, dizziness and headaches. Drs. Salcedo and Blotner have credibly testified that Claimant is in need of continuing emotional therapy and medicinal management of his physical pain arising out of the August 22, 1994, work accident. Therefore, I find and conclude that Employer/Carrier is liable to Claimant for reasonable and necessary medical expenses related to his August 22, 1994, work accident, including treatment for his vision and concentration problems, dizziness, headaches and any physical therapy or vocational training which

may be reasonably required as a result of Claimant's closed head injury.

D. Section 10 (f) Retroactive Cost of Living Adjustments

Claimant maintains he is entitled to an annual cost of living adjustment plus interest for his permanent total disability. Under the Act, Section 10(f) prescribes:

> (f) Effective October 1 of each year, the compensation or death benefits payable for permanent total disability or death arising out of injuries subject to this Act shall be incresed by the lesser of–
>
> (1) a percentage equal to the percentage (if any) by which the applicable national weekly wage for the period beginning on such October 1, as determined under section 6(b), exceeds the applicable average weekly wage, as so determined, for the period beginning with the preceding October 1; or
>
> (2) 5 percentum.

33 U.S.C. § 10(f).

Section 10(f), as amended in 1972, provides that in all post-Amendment injuries where the injury resulted in permanent and total disability or death, the compensation shall be adjusted annually to reflect the rise in the national average weekly wage. 33 U.S.C. § 910(f).

In Phillips v. Marine Concrete Structures, 895 F.2d 1033, 23 BRBS 36 (CRT) (5th Cir. 1990) (en banc), the Fifth Circuit found from the plain and unambiguous words of Section 10(f) that the only cost of living adjustments Section 10(f) provided were for permanent and total disability. There are no cost of living (Section 10(f)) adjustments for periods of temporary and total disability, or for the Section 10(f) adjustments that accrued during the worker's period of temporary total disability. Section 10(f) adjustments begin the first October 1 following the date the claimant's condition became permanent. Phillips v. Marine Concrete Structures, 21 BRBS 233 (1988).

In view of the foregoing, I find Claimant is entitled to an annual cost of living adjustment to be determined by the Director of the Office of Workers' Compensation Programs beginning retroactively from October 1, 1996. Claimant was determined to be permanently totally disabled under the Act on April 19, 1996. October 1, 1996 was the first "October 1" following Claimant's permanent total disability status. Therefore, I find and conclude Claimant is entitled to a cost of living adjustment from October 1, 1996 and continuing on each successive October 1.

E. Section 8(f) Special Fund Relief

Section 8(f) of the Act limits Employer's liability to a claimant to one hundred and four (104) weeks if the record establishes that (1) the employee had a pre-existing permanent partial disability, (2) which was manifest to the employer prior to the subsequent compensable injury, and (3) which combined with the subsequent injury to produce or increase the employee's permanent total or partial disability which is greater than that resulting from the first injury alone. Lawson v. Suwanee Fruit and Steamship Co., 336 U.S. 198 (1949); FMC Corporation v. Director, OWCP, 886 F.2d 1185, 23 BRBS 1 (CRT) (9th Cir. 1989); Director, OWCP v. Newport News Shipbuilding & Dry Dock Co., 676 F.2d 110, 14 BRBS 716 (CRT) (4th Cir. 1982); Director, OWCP v. Sun Shipbuilding & Dry Dock Co., 600 F.2d 440, 10 BRBS 621 (CRT) (3d Cir. 1979); C&P Telephone v. Director, OWCP, 564 F.2d 503, 6 BRBS 399 (CRT) (D.C. Cir. 1977); Equitable Equipment Co. v. Hardy, 558 F.2d 1192, 6 BRBS 666 (CRT) (5th Cir. 1977); Shaw v. Todd Pacific Shipyards, 23 BRBS 96 (1989).

The provisions of Section 8(f) are to be liberally construed. Director v. Todd Shipyard Corporation, 625 F.2d 317, 12 BRBS 518 (9th Cir. 1980). The reason for this liberal application of Section 8(f) is to encourage employers to hire disabled or handicapped individuals. Lawson, supra.

"Pre-existing disability" refers to disability in fact and not necessarily disability as recorded for compensation purposes. Lawson, supra. "Disability" as defined in Section 8(f) is not confined to conditions which cause purely economic loss. C&P Telephone Company, supra. "Disability" includes physically disabling conditions serious enough to motivate a cautious employer to discharge the employee because of a greatly increased risk of employment-related accidents and compensation liability. Director, OWCP v. Campbell Industries, Inc., 678

F.2d 836, 14 BRBS 974 (CRT) (9th Cir. 1982); Equitable Equipment Co., supra.

The judicially created "manifest" requirement does not mandate actual knowledge of the pre-existing disability. If, prior to the subsequent injury, employer had knowledge of the pre-existing condition, or there were medical records in existence from which the condition was objectively determinable, the manifest requirement will be met. Equitable Equipment Co., supra; see also Eymard & Sons Shipyard v. Smith, 862 F.2d 1220, 1224 (5th Cir. 1989).

The medical records need not indicate the severity or precise nature of the pre-existing condition for it to be manifest. Todd v. Todd Shipyards Corp., 16 BRBS 163, 167-68 (1984). If a diagnosis is unstated, there must be a sufficiently unambiguous, objective and obvious indication of a disability reflected by the factual information contained in the available medical records at the time of injury. Currie v. Cooper Stevedoring Co., 23 BRBS 420, 426 (1990). Furthermore, a disability is not "manifest" simply because it was "discoverable" had proper testing been performed. Eymard & Sons Shipyard, supra; C.G. Willis, Inc. v. Director, OWCP, 31 F.3d 1112, 1116, 28 BRBS 84, 88 (CRT) (11th Cir. 1994). There is not a requirement that the pre-existing condition be manifest at the time of hiring, only that it be manifest at the time of the compensable (subsequent) injury. Director, OWCP v. Cargill, Inc., 718 F.2d 886, 16 BRBS 85 (CRT) (9th Cir. 1985).

An injury or condition is manifest if diagnosed and identified in a medical record which provides the employer with constructive knowledge of its existence. Director, OWCP v. Vessel Repair, Inc. [Vina], 168 F.3d 190, 196, 33 BRBS 65, 70 (CRT) (5th Cir. 1999). The manifestation requirement will be satisfied where the employer can show that the pre-existing injury or condition had been documented or otherwise shown to exist prior to the second injury. American Ship Building Co. v. Director, OWCP, 865 F.2d 727, 732, 22 BRBS 15, 23 (CRT) (6th Cir. 1989). When medical records no longer exist, the testimony of a physician can be used as circumstantial evidence of their existence and the fact of a prior injury or condition and satisfy the manifestation requirement. Esposito v. Bay Container Repair Co., 30 BRBS 67, 68 (1996).

Where Section 8(f) relief may be applicable, the Special Fund is not liable for Claimant's medical benefits. Spencer v.

Bethlehem Steel Corp., 7 BRBS 675 (1978). If payments are made by the Employer/Carrier for which the Special Fund is ultimately found responsible, Employer/Carrier will be entitled to a credit or refund from the Special Fund. Balzer v. General Dynamics Corp., 22 BRBS 447, 456 (1989); Phillips v. Marine Contract Structures, supra. However, the Board has held than an employer is entitled to interest, payable by the Special Fund, on monies paid in excess of its liability under Section 8(f). Campbell v. Lykes Brothers Steamship Co., Inc., 15 BRBS 380 (1983); Lewis v. American Marine Corp., 13 BRBS 637, 639-40 (1981).

Section 8(f) will not apply to relieve an employer of liability unless it can be shown that an employee's permanent disability was not due solely to the most recent work-related injury. Two "R" Drilling Co. v. Director, OWCP, 894 F.2d 748, 23 BRBS 34 (CRT) (5th Cir. 1990). An employer must set forth evidence to show that a claimant's pre-existing permanent disability combines with or contributes to a claimant's current injury resulting in a greater degree of permanent partial or total disability. Id. If a claimant's permanent disability is a result of his work injury alone, Section 8(f) does not apply. C&P Telephone Co., supra; Picoriello v. Caddell Dry Dock Co., 12 BRBS 84 (1980). Moreover, Section 8(f) does not apply when a claimant's permanent disability results from the progression of, or is a direct and natural consequence of, a pre-existing disability. Cf. Jacksonville Shipyards, Inc. v. Director, OWCP, 851 F.2d 1314, 1316-17, 21 BRBS 150 (CRT) (11th Cir. 1988).

In the present matter, Employer timely applied for Section 8(f) relief on April 21, 1997, while the matter was still before the District Director. (EX-M). The medical evidence and Claimant's own testimony indicate Claimant indeed has an extensive history of prior head trauma. (See, e.g., Tr. 34-35, 114-23). Dr. Harch observed Claimant had sustained multiple head and brain injuries in the past and opined the August 22, 1994 injury was just the last of a series of significant blows to the head. Therefore, Dr. Harch opined Claimant's closed head injury is "partly" related to his August 22, 1994 work accident.

Claimant also presented pre-existing emotional problems. He reported to Dr. Salcedo a history of a suicide attempt. Claimant reported to Dr. Blotner a history of an accidental self-inflicted gunshot wound in the stomach. (Tr. 34). The combination of previous head trauma and emotional problems constitute a pre-existing permanent partial disability, which was not economically disabling. See Campbell Industries, supra.

Claimant's prior head, brain and emotional problems and gunshot wound were manifest to Employer through Claimant's own testimony and available medical records. Claimant testified he had a pre-employment physical before working for Employer during which he related to the company doctor that he had sustained some concussions in high school and had sustained a gunshot wound in his stomach in 1988.

Furthermore, Dr. Harch credibly opined Claimant's closed head injury is "partly" due to the August 22, 1994 accident, which he testified is just the last in a series of significant blows to the head. As Claimant's head, brain and emotional problems were not economically disabling before the August 22, 1994 accident, Claimant's current disability is greater than his pre-existing disability. Moreover, Claimant's pre-existing conditions posed the very sort of increased compensation risks that would motivate an employer to discharge or refuse to hire him.

Accordingly, the Claimant's prior head, brain and emotional problems were manifest to Employer by means of Claimant's pre-employment physical and available medical records. Thus, Employer qualifies for Section 8(f) relief due to the increase in Claimant's disability after the August 22, 1994 work accident.

It is stipulated that Employer/Carrier have paid Claimant total disability benefits characterized as temporary since August 22, 1994. I have found and concluded that Claimant was temporarily totally disabled from the date of his accident (August 22, 1994) until April 19, 1996, when he reached maximum medical improvement. On April 19, 1996, Claimant's total disability became permanent and should be so characterized. Thus, disability benefit payments from April 19, 1996, to present, and continuing are permanent total disability benefits. See generally Shaw v. Todd Pacific Shipyards Corp., 23 BRBS 96, 99-100 (1989).

Employer/Carrier have voluntarily paid "temporary" total benefits based on Claimant's average weekly wage since August 22, 1994 and continued to pay total disability benefits after Claimant's status became permanent. As the Fifth Circuit, within whose jurisdiction this case arises, has recognized, "if a Claimant is entitled to a 'total' disability payment, the amount of the weekly benefit is the same whether the disability is temporary or permanent." FMC Corp. v. Perez, 128 F.3d 908,

910, 31 BRBS 162 (CRT) (5th Cir. 1997). Thus, Employer/Carrier have continued to pay "total" disability benefits since Claimant's work accident. Their payments from April 19, 1996, for the subsequent 104 weeks, of total disability of a permanent nature fulfill their obligation under Section 8(f) of the Act. All payments after the 104 week period commencing on April 19, 1996, constitute an overpayment for which Employer/Carrier are due reimbursement as a credit/refund from the Special Fund with interest thereon. The total disability benefit payments from April 19, 1996, and the succeeding 104 weeks, must be adjusted commencing on October 1, 1996 and October 1, 1997, for retroactive cost of living increases for which Employer/Carrier are responsible and which thereafter becomes the responsibility of the Special Fund.

V. ATTORNEY'S FEES

No award of attorney's fees for services to Claimant is made herein since no application for fees has been made by Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision to submit an application for attorney's fees.[17] A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

VI. ORDER

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[17] Counsel for Claimant should be aware that an attorney's fee award approved by an administrative law judge should compensate only the hours spent between the close of the informal conference proceedings and the issuance of the administrative law judge's Decision and Order. Revoir v. General Dynamics Corp., 12 BRBS 524 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of Administrative Law Judges provides the clearest indication of the date when informal proceedings terminate. Miller v. Prolerized New England Co., 14 BRBS 811, 823 (1981), aff'd, 691 F.2d 45 (1st Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for hours earned after **September 15, 1999**, the date the matter was referred from the District Director.

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

1. Employer/Carrier shall pay Claimant compensation for **temporary total disability** from **August 22, 1994** to **April 19, 1996**, based on Claimant's stipulated average weekly wage of $372.94, in accordance with the provisions of Section 8(b) of the Act. 33 U.S.C. § 908(b).

2. Employer/Carrier shall pay Claimant compensation for **permanent total disability** from **April 19, 1996** to **April 18, 1998** or **104 weeks,** based on Claimant's stipulated average weekly wage of $372.94, in accordance with the provision of Section 8(e) of the Act. 33 U.S.C. § 908(e).

3. Employer/Carrier shall pay all reasonable, appropriate and necessary medical expenses arising from Claimant's August 22, 1994 work injury, pursuant to the provisions of Section 7 of the Act. 33 U.S.C. § 907.

4. Claimant is entitled to an annual cost of living adjustment to be determined by the Director of the Office of Workers' Compensation Programs beginning retroactively from October 1, 1996, pursuant to the provisions of Section 10(f) of the Act. 33 U.S.C. § 910(f).

5. Upon expiration of 104 weeks after April 19, 1996, Employer is entitled to Section 8(f) relief and such continuing compensation and adjustments shall be paid pursuant to Section 8(f) from the Special Fund established pursuant to the provisions of Section 44 of the Act. 33 U.S.C. § 944.

6. Employer/Carrier shall receive credit for all compensation heretofore paid, as and when paid. Employer/Carrier are further entitled to reimbursement of all permanent total disability benefits paid after April 18, 1998, or 104 weeks from April 19, 1996, with appropriate interest thereon, in excess of monies owed to Claimant by Employer/Carrier as an overpayment from the Special Fund. The District Director shall calculate such an overpayment and reimbursement amounts.

7. Employer/Carrier and the Special Fund shall pay interest on any sums determined to be due and owing as set forth in this Order at the rate provided by 28 U.S.C. § 1961 (1982); Grant v. Portland Stevedoring Co., et al., 16 BRBS 267 (1984).

8. Claimant's attorney shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges; a copy must be served on Claimant and opposing counsel who shall then have twenty (20) days to file any objections thereto.

ORDERED this 2d day of February 2001, at Metairie, Louisiana

LEE J. ROMERO, JR.
Administrative Law Judge